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No. 82-374

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT FLANAGAN,

*Petitioner*

*v.*

UNITED STATES OF AMERICA,

*Respondent*

JAMES KEWESHAN,

*Petitioner*

*v.*

UNITED STATES OF AMERICA,

*Respondent*

JOSEPH LANDIS,

*Petitioner*

*v.*

UNITED STATES OF AMERICA,

*Respondent*

THOMAS McNAMEE,

*Petitioner*

*v.*

UNITED STATES OF AMERICA,

*Respondent*

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF FOR PETITIONERS

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## QUESTIONS PRESENTED

1. Whether the panel of the Third Circuit Court of Appeals, in affirming the district court's disqualification of Petitioners' counsel, committed error and, in so doing, disregarded decisions of this Court, by denying Petitioners their constitutional right to counsel of their choice to present their common defense in this criminal case, based only on a spectre of potential conflicts of interest, and despite Petitioners' intelligent assertion of their right to counsel of choice at a Rule 44(c) proceeding?

2. Whether the panel of the Third Circuit Court of Appeals committed error in utilizing an incorrect standard of review of the trial court's order denying Petitioners the counsel of their choice to present their common defense in this criminal case, by promulgating a standard requiring affirmance of such a disqualification order unless there is good cause to believe that no conflict of interest is likely to arise or that the disqualification of counsel was an abuse of discretion, when, in fact, in the face of Petitioners' intelligent exercise of their right to counsel, a trial court must permit Petitioners to go to trial with counsel of their choice?

3. Whether the panel of the Third Circuit Court of Appeals committed error by concluding that Fed.R. Crim.P. 44(c), utilized alone or in conjunction with the trial court's supervisory powers, permits a court to deny Petitioners their constitutionally protected choice of retained counsel despite the fact that a valid waiver of potential conflicts of interest had been obtained?

4. Whether the panel opinion of the Third Circuit Court of Appeals destroys the constitutional rights of Petitioners to consult with and retain counsel of their choice?

5. Whether the panel opinion of the Third Circuit Court of Appeals absolutely precludes the presentation of a common defense by defendants jointly charged in a criminal case?

6. Whether the panel opinion of the Third Circuit Court of Appeals absolutely precludes representation by one attorney of multiple defendants in criminal cases, regardless of the facts and circumstances underlying each case?

7. Whether, in a case where each criminal defendant asserts his innocence, provides information to counsel consistent with that of each other defendant and exculpatory as to all defendants, and affirmatively represents his desire to present a common defense, and where counsel representing all defendants represents that no conflict of interest exists among them and that he can provide full and undivided loyalty to each in connection with his representation, it is error for the court to disqualify such counsel from representing any or all defendants, thereby violating these defendants' constitutional right to be represented by counsel of their choice?

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## BRIEF FOR PETITIONERS

## OPINIONS BELOW

The Opinion of the panel of the United States Court of Appeals for the Third Circuit, affirming the Opinion of the United States District Court for the Eastern District of Pennsylvania, is reported at 679 F.2d 1072 (3d Cir.

1982). A copy of this Opinion is printed in the Appendix at PA2.[1]

The Judgment of the Third Circuit Court of Appeals, dated June 2, 1982, affirming the Judgment of the District Court entered December 4, 1981, is printed in the Appendix at PA32.

The Orders of the Third Circuit Court of Appeals denying Petitions for a Rehearing and recalling its mandate erroneously issued are printed in the Appendix at PA34, PA1.

The Opinion of the United States District Court for the Eastern District of Pennsylvania, affirmed by the panel of the Third Circuit, is reported at 527 F.Supp. 902 (E.D.Pa. 1981). A copy of this Opinion is printed in the Appendix at PA12.

The District Court's Order of December 2, 1981, granting the government's Motion to Prohibit Multiple Representation of Petitioners is printed in the Appendix at PA29.

The District Court's Order of December 4, 1981, granting Petitioners' Motion for Reconsideration and/or Clarification is printed in the Appendix at PA30.

## JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, printed in the Appendix at PA32, was entered on June 2, 1982. On July 12, 1982, the Court denied a Petition for Rehearing, filed by each of the Petitioners herein. PA34. The Petition for a Writ of Certiorari was filed on September 1, 1982, and was granted on January 10, 1983.

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1. All references herein to materials printed in the Appendix to the Petition for Certiorari are designated as "PA____." All references herein to materials printed in the Joint Appendix are designated as "A____."

## CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES OF PROCEDURE INVOLVED

United States Constitution:

"Amendment V:

"No person shall . . . be deprived of life, liberty, or property without due process of law; . . ."

"Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

Federal Rule of Criminal Procedure 44(c):

"Whenever two or more defendants have been jointly charged . . . or have been joined for trial . . . , and are represented by the same retained . . . counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel."

## STATEMENT OF THE CASE

Petitioners were members of the Philadelphia Police Department's "*grandpop*" squad, a decoy team comprised of volunteers assigned to the stake-out unit, a team of officers that is trained to deal with street crime. The team decoy, posing as a male who is aged and infirm, is likely to attract muggers and robbers who would normally feast upon the truly helpless. Petitioner Flanagan generally assumed the decoy role, with Petitioners McNamee, Keweshan and Landis providing protection and making arrests.

During the Spring of 1981, Petitioners knew[2] that: (1) the Philadelphia District Attorney had begun an investigation into arrests made by the decoy team to determine whether criminal charges should be lodged against the team; (2) a federal grand jury had begun an investigation of the same arrests to determine whether federal charges should be lodged; and (3) the Internal Affairs Unit of the Philadelphia Police Department had begun its own investigation into the same arrests.[3] Moreover, while all three investigations were proceeding, Petitioners were called to state court, on numerous occasions, to testify at preliminary hearings and trials of defendants they had arrested, which arrests were often the subject of these official inquiries.[4]

During this period, each Petitioner independently determined that he needed counsel to assist him in dealing with the complex and confusing situation then unfolding and decided that his own interests were best served by presenting a common front in the face of the investigations. On May 6, 1981, each Petitioner retained the firm of Sprague & Rubenstone to provide representation in each of these matters given each Petitioner's belief in the skill and expertise of the law firm's members, particularly that of Richard A. Sprague, Esquire. Mr. Sprague, an attorney with a national reputation as a prosecutor as well as a defense lawyer, and who had for-

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2. On Sunday, February 1, 1981, the Philadelphia Inquirer, the major daily newspaper in Philadelphia, ran a front page article purporting to investigate the propriety of certain arrests made by Petitioners' decoy team. As a result of this and a spate of other articles, Petitioners were reassigned by the Commissioner of Police to other police duties.

3. Internal Affairs found no evidence of wrongdoing by the team.

4. The District Attorney did not file criminal charges against Petitioners, but he did dismiss five cases lodged against state court defendants arising from the decoy team's arrests based on the fact that each defendant passed a lie detector test. The District Attorney has and continues to press forward with other prosecutions based solely upon arrests and testimony of Petitioners herein.

merly served as First Assistant District Attorney for the City of Philadelphia, was known to each Petitioner as both a fearless and effective advocate,[5] and a person possessed of intimate knowledge of the workings of the Philadelphia Police Department. In fact, Mr. Sprague and the firm had previously represented several Philadelphia Police Officers, charged with criminal offenses, in which instances acquittals had been obtained.

Following a general discussion with Petitioners as to their reasons for seeking legal counsel, Mr. Sprague and members of the firm met at length with each Petitioner, individually. Only after determining that a Petitioner possessed no incriminating evidence respecting himself and the other Petitioners did counsel speak in turn with each other Petitioner. Only after determining that each Petitioner possessed no belief or evidence regarding the matters at issue which conflicted with those of the other Petitioners, did counsel determine that a common defense could be presented on Petitioners' behalf. Only after discussion with each Petitioner did counsel agree that the presentation of a common defense was appropriate and desireable. In short, counsel determined that each Petitioner asserted his innocence as to the charges lodged against him, that each supported the claims of innocence made by each other Petitioner, that no conflicts of interest would exist among and between the Petitioners if all were represented by one attorney,[6] and that a common defense as desired by

5. For example, the Supreme Court of the Commonwealth of Pennsylvania had appointed Mr. Sprague to conduct an investigation into allegations of misconduct by a sitting State Supreme Court Justice. He also, on special appointment, investigated and prosecuted those responsible for the United Mine Worker Assassinations of "Jock" Yablonski and his family.

6. Based on counsel's assessments of the innocence of Petitioners' and the absence of any conflict of interests, counsel instructed Petitioners to appear and to testify at state court trials of persons arrested by the decoy team, even though Petitioners would be subjected to cross-examination and their testimony could be used against them at any future state or federal trial.

each Petitioner, was the proper defense to present on their behalf if charges were lodged against them.

Both prior and subsequent to the return of a federal indictment, Sprague & Rubenstone expended hundreds of hours in connection with the representation of Petitioners, including conducting investigations of the decoy team's arrests, interviewing witnesses, reviewing police records, appearing at state court proceedings, preparing briefs and motions, and advising its clients as to innumerable matters which arose during the course of the representation. Most of this representation dealt with matters separate and apart from the federal grand jury investigation.

Over the next few months, as the Petitioners and counsel continued to work together, Petitioners developed a greater feeling of confidence and trust in the firm of Sprague & Rubenstone and its lawyers, complementing and supplementing the respect for the firm's abilities which had caused each Petitioner initially to decide to retain the firm as counsel. *See, e.g.*, PA68.

On September 10, 1981, four months after the firm was retained, Petitioners were charged with criminal violations of the federal civil rights statutes in a thirteen count indictment returned by a grand jury sitting in the Eastern District of Pennsylvania. The return of an indictment did not alter Petitioners' predetermined decision to proceed upon a common defense even were separate counsel ordered. PA43-PA44. Indeed, from the first date Petitioners appeared in the office of their counsel, each had been advised of potential conflicts of interest and the option of proceeding with separate counsel. PA42-PA45. From the inception of the attorney-client relationship, each Petitioner decided that, despite knowledge of available options and the possibility of judicial intervention in the retention of counsel of his choice, he wished to proceed with a common defense to be presented by the firm of Sprague & Rubenstone. PA52, PA55, PA65-PA66.

In response to the Respondent's Motion for a Hearing and to Prohibit Multiple Representation, which motion sought only to prevent Sprague & Rubenstone from representing more than one Petitioner, the district court held a hearing on November 12, 1981, pursuant to Fed.R.Crim.P. 44(c). At that hearing, each Petitioner repeatedly and unequivocally stated his desire to have a unified defense presented by Sprague & Rubenstone, his awareness of potential conflicts which could arise, his desire to secure his right to counsel of choice over his right to conflict-free counsel, and his willingness to effectuate that choice, through the mechanism of a waiver of potential conflicts of interest.

Midway through the lengthy Rule 44(c) hearing, the trial court stated that "it is quite apparent that there is no actual conflict today." PA45. Following the hearing, the trial court found the following additional facts:

> "It appears to me quite apparent that a conflict of interest is likely to arise in the course of the proceedings.
>
> "It is equally apparent that each of these defendants is fully and completely aware of the potential for conflict of interest, and that each, without financial pressure, has made the decision to waive any claim of conflict of interest, and is doing so intelligently and voluntarily and to be represented by one counsel." PA74.

Based upon these facts, the trial court asked that certain issues be further briefed.

> "I am not satisfied at this moment that in light of my perception that the conflict of interest is very likely to arise in this case, that I can nevertheless accept the waiver of these defendants." PA74.
>
> * * *
>
> "If I do decide that separate counsel are required, does this require that present counsel be eliminated from the case altogether?" PA76.

Briefs were simultaneously submitted on these issues by Petitioners and Respondent on November 19, 1981.

On December 2, 1981, the trial court entered an Order precluding Petitioners from retaining counsel of their choice by disqualifying the firm of Sprague & Rubenstone from representing any Petitioner herein. PA 29. On December 3, 1981, Petitioners filed a Motion for Reconsideration and/or Clarification to assure that the basis for the court's Order was clear. On December 4, 1981, the court granted the Motion, clearly setting forth as the basis for its disqualification — "the presumption that privileged information has been acquired as a result of the attorney-client relationship." PA30.

The trial court stayed its Order so that the correctness of its holding might be determined by the Third Circuit. PA29, PA40. On June 2, 1982, a panel of the Third Circuit issued a Judgment and Opinion affirming the trial court. PA2, PA32. The panel did not contest the validity of each Petitioner's waiver. Rather, it held that it must affirm the trial court's decision unless "there is good cause to believe that no conflict of interest is likely to arise, or that the measures taken were an abuse of discretion." PA5-PA6. The Petitioners filed a Petition for Rehearing and Rehearing En Banc, which Petition was denied by the Court on July 12, 1982. PA34. The Court granted Petitioners' Application for a Stay of Issuance of Mandate, pending the filing of a Petition for a Writ of Certiorari. PA1. The Petition for Certiorari was filed on September 1, 1982. On January 10, 1983, the Petition was granted by this Court.

## ARGUMENT

### SUMMARY OF ARGUMENT

> "An attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." *Holloway v. Arkansas*, 435 U.S. 475, 485 (1978).

It is shocking that in the nearly two hundred years that this Republic has endured, the question posed by

this case is sufficiently controversial to require Supreme Court review. How is it possible that persons jointly charged with the commission of criminal acts are denied their choice of counsel to present their common defense? How can it be that any court, purporting to act in the best interests of such persons, can deny them the right to be represented by counsel of their choice when, with full knowledge of the allegations against them, the underlying facts, and the theoretical conflicts surrounding such representation, the defendants nonetheless determine to proceed with a common defense presented by chosen counsel and to waive any conflict of interest.

Yet, this Orwellian scenario has in fact occurred in this case, thereby requiring review of the rulings of the trial and appellate courts by this Honorable Court.

The instant situation is well illustrated by the following hypothetical. Assume that four police officers have been charged with the commission of criminal offenses as the result of a frameup; that they are not only totally innocent of all charges lodged against them, but that all relate the same exculpatory facts in support of their defense. Assume that they each determine to present a common defense and that one specific law firm, headed by a lawyer in whom they have supreme confidence and trust, is chosen by them to present that common defense.

Under such facts, were the rulings of the trial and appellate courts in the instant case to stand, a court would have the power to prevent the law firm from representing any of the police officers. Indeed, "potential" conflict could always be made "actual" by an external event beyond the control of the officers, such as the United States offering to plea bargain with one of the wholly innocent officers. Yet it cannot be contended that such an offer, which might never be made or, if made, not accepted, should preclude all of the officers from having chosen counsel present their common defense. Moreover, without knowledge of the facts, a court could

incorrectly surmise that some privileged information disclosing a conflict of interest may have been provided to counsel, thereby requiring counsel's disqualification. Surely, such surmise, being pure speculation as well as an unfounded attack on the integrity of counsel, should not preclude all of the officers from having chosen counsel present their common defense.

*This hypothetical is the case at bar.* However, in this case, the Court of Appeals held that the trial court did not abuse its discretion in disqualifying the firm of Sprague & Rubenstone from representing any of the Petitioners, and employed an incorrect standard of review. The Third Circuit incorrectly held that it must affirm the lower court's disqualification of Petitioners' chosen counsel unless "There is good cause to believe that no conflict of interest is likely to arise, or that the measures taken [disqualification] were an abuse of discretion." PA5-PA6.

The trial court's actions, affirmed by the Court of Appeals, were also predicated upon its perception that conflicts of interest were likely to arise during the course of the proceedings, based upon the receipt of privileged information from each Petitioner by the law firm. Given this fact, the trial court concluded that its supervisory powers warranted the drastic sanction imposed, despite the knowing, voluntary, and intentional waivers of his right to separate counsel by each Petitioner, and despite Petitioners' continued, avowed desire to have a common defense presented by the law firm.

The rulings of both the trial and appellate courts are erroneous for the following reasons. This Court has held, in the post-trial context, that only an adverse effect on an attorney's performance arising from an actual conflict of interest, based on his representation of several co-defendants, may permit a finding of ineffective assistance of counsel. This same standard cannot be neatly applied to pretrial proceedings, since, prior to trial, no adverse effect on an attorney's performance can be demonstrated. However, it is submitted that before multiple representa-

tion can be barred, there must at least be so substantial a conflict of interest presented as to warrant the Court in presuming a future adverse effect. And such adverse effect may not be the result of external factors, such as a potential plea bargain offer from the United States, for to so hold would preclude multiple representation altogether, since such potential exists in every case. Furthermore, a finding of future adverse effect may not be based solely on the subjective surmise of the trial court, for to so hold would likewise preclude multiple representation. Finally, since a trial court may not learn the facts underlying the common defense and the bases for the defendants' decision to be represented by one lawyer, the predicate for such speculation likewise exists in every multiple representation case.

It is for these reasons that, as this Court has held, the decision respecting the propriety of multiple representation must be left largely with counsel; the role of a court in this process is primarily to assure that the defendant's determinations are made knowingly, voluntarily, and intelligently.

Second, Rule 44(c) of the Federal Rules of Criminal Procedure does not authorize the sanction here imposed. That Rule merely provides a uniform mechanism to assure the court that co-defendants are aware of the potential conflicts arising or which may arise from multiple representation and that their choice of counsel, whoever it may be, is the result of a knowing, intelligent, and voluntary decision. The Rule provides the court with an opportunity to determine whether, in multiple representation cases, the defendants understand the potential difficulties which may ensue from such representation and whether each defendant chooses to exercise his right to counsel of choice over his right to conflict-free counsel. The Rule does not, and cannot, change the law applicable to multiple representation of co-defendants, nor can it be read, interpreted or applied so as to abridge each Petitioner's Sixth Amendment right to counsel of

his choice to present his common defense. Moreover, the general supervisory powers of a court, viewed in concert with or separate from F.R.Crim.P. 44(c), do not permit judicial intervention to deprive any Petitioner of counsel of his choice and to present a common defense where no actual conflict exists.

Third, had Petitioners, in agreeing to present a common defense, each retained separate counsel and had each made themselves available to all counsel in order to prepare and present that common defense, the rationale underlying the opinion of the trial court — and accepted by the Third Circuit — would require the disqualification of each such counsel because the potential conflict arising from counsel having obtained privileged information from each Petitioner is the basis for the Order appealed from. Such a result cannot be justified by either logic or case law. In addition, since the potential conflicts deemed lurking in this matter are, in large part, the inevitable result of each Petitioner's decision to present a common defense and of the trial strategy to be employed to meet that objective, and not the result of multiple representation, and since these choices are likewise constitutionally protected, the trial and appellate courts below erred by precluding the firm of Sprague & Rubenstone from representing each Petitioner in accordance with his express choice.

The Third Circuit's holding that affirmance of the trial Court was required unless "there is good cause to believe that no conflict of interest is likely to arise or that the measures taken were an abuse of discretion," PA5-PA6, was also in error. First, having recognized each Petitioner's waiver of any potential conflict of interest arising from the presentation of their common defense, the trial court had no lawful power to disqualify counsel. Second, the trial court had no discretion whatsoever to interfere with Petitioners' decisions to elevate their constitutional right to counsel of choice over their constitutional right to conflict-free counsel. Third, absent an

actual conflict of interest engendered by *prior* representations, neither Rule 44(c), nor the Disciplinary Rules sanction the judiciary's disqualification of counsel chosen by defendants in a criminal action to present a common defense. Were these Rules interpreted otherwise, they would be unconstitutional, in derogation of each Petitioners' constitutionally protected right to counsel of his choice.

Finally, the most pernicious aspect of the opinions below is the unstated underpinning of their holdings — that the privileged information shared by Petitioners with counsel was not only inconsistent with a common defense but also incriminating as to some or all Petitioners. Had the courts below believed that, for example, each Petitioner had been charged only as a result of mistaken identification, and had not been involved in any way with any crime here charged, neither court would have likely disqualified or countenanced the disqualification of counsel from presenting the common defense of each Petitioner on the basis of counsel's receipt of privileged information.

By presuming the receipt of inconsistent and incriminating privileged information, both the trial court and the Court of Appeals have maligned counsel as well, necessarily assuming that counsel has failed to adhere to the Code of Professional Responsibility, and, in the face of a conflict known to counsel, has nonetheless determined to continue to represent Petitioners.

It is clear that a court is not entitled to know what information has been provided to counsel or why a certain defense strategy has been chosen by Petitioners. It is for these reasons that this Court has repeatedly deferred to counsel's judgment in multiple representation cases. *E.g.*, *Cuyler v. Sullivan*, 446 U.S. 335, 346-347 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 485 (1978). The unsupported and unsupportable assumption by the courts below that counsel has not acted in accordance with the Code of Professional Responsibility,

and that counsel is therefore not acting in the best interest of each Petitioner, has resulted in the unprecedented intervention by these courts in each client's choice of counsel, based on no more than speculation and each court's assessment of what is best for each Petitioner. Such paternalism is offensive. When based on no facts whatsoever, it is grievous error. Only Petitioners can choose which constitutional right they seek to implement. Only Petitioners know whether the spectre of potential conflicts is real or imagined. Only Petitioners can choose specific counsel as the best vehicle to present their common defense. Given petitioners' voluntary and intelligent choice to be represented by one attorney in this case, no lawful basis exists upon which their choice may be challenged, much less overturned.

## I.

## MULTIPLE REPRESENTATION

The appellate court below held that the trial court had the discretion to disqualify, pretrial, the counsel chosen and retained by Petitioners, based upon *potential* conflicts of interest which the trial court deemed likely to arise at trial because of multiple representation. The major potential conflict foreseen by the trial and appellate courts was the spectre of some unnamed evil affecting some or all of Petitioners based on counsel's receipt of privileged information from each Petitioner. It is respectfully submitted that this holding is erroneous. Indeed, were it correct, an absolute ban on multiple representation of criminal defendants would be required since the same potential for conflict is inherent in any such lawyer-client relationship.

The multiple representation cases decided by this Court, each of which has arisen in the context of post-trial challenges to convictions, which challenges are based upon allegations of ineffective assistance of counsel due to multiple representation, hold that multiple representation is constitutionally protected and that both

an actual conflict and an adverse effect resulting from that conflict must be established in order to demonstrate a constitutional deprivation. Although these cases refer to post-trial proceedings, the principles which they enunciate are instructive in illuminating the appropriate standards applicable to pre-trial disqualification proceedings arising from multiple representation. No authority exists to support the disqualification of counsel pre-trial where defendants have chosen, in connection with the presentation of their common defense, to assert their constitutional right to counsel of their choice over conflict-free counsel. Here, each Petitioner has so elected, even though such election is couched in terms of waiver. Thus, there is no basis upon which the disqualification of counsel may be sustained.

In order to comprehend the errors and misconceptions of the trial and appellate courts below, it is necessary to trace the development of the views of the Third Circuit, to whom the Writ of Certiorari was issued, on the issues of post-trial review of claims of ineffective assistance of counsel based on multiple representation and conflicts of interest. In particular, it should be noted that the Third Circuit has held, in a post-trial context, that a mere potential for a conflict of interest, no matter how remote, warranted a finding of ineffective assistance of counsel. Although this holding has been corrected by this Court, it now appears that the Third Circuit has resurrected its original and incorrect standard and has applied it, in this case, to pre-trial disqualification proceedings.

A. *Multiple Representation Before And After Cuyler v. Sullivan*

The belief that a potential conflict of interest existing pre-trial, no matter how remote, is sufficient to overturn a conviction based upon ineffective assistance of counsel for multiple defendants represented by one attorney, was the predicate for the Third Circuit's decision in *United States ex rel. Sullivan v. Cuyler*, 593 F.2d 512

(3d Cir. 1979), *vacated* 446 U.S. 335 (1980), (hereinafter "*Cuyler I*"). Two privately retained attorneys had represented both Sullivan and two co-defendants in connection with state court murder trials. Sullivan raised no objection to such representation, based, in part, on his inability to afford his own counsel,[7] and was tried and convicted, after resting without presenting a defense. His co-defendants were later acquitted at separate trials.

After exhausting his state remedies, Sullivan filed a habeas corpus petition arguing, *inter alia*, that counsel had a conflict of interest based upon their representation of his two co-defendants. The Third Circuit reversed the denial of the petition, finding that the mere possibility of conflict of interest resulting from multiple representation was sufficient to deprive a defendant of his right to effective assistance of counsel.

On appeal, this Court specifically and unequivocally held that the standard enunciated by the Third Circuit in *Cuyler I* was erroneous. In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), (hereinafter "*Cuyler II*") the Court held both that the Rule 44(c) inquiry is not constitutionally mandated,[8] and that multiple representation does not violate the Sixth Amendment absent an *actual* conflict of interest and an adverse impact on the performance of counsel.

In reaching this conclusion, *Cuyler II* relied heavily on two earlier Supreme Court cases, *Holloway v. Arkan-*

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7. Here, since the Philadelphia Fraternal Order of Police is paying for the representation of each Petitioner [PA49], financial considerations had nothing to do with each Petitioner's desire to retain Sprague & Rubenstone for the purpose of presenting a common defense.

8. "[W]e conclude that the Sixth Amendment imposed upon the [state] trial court no affirmative duty to inquire into the propriety of multiple representation." *Cuyler II*, *supra*, 446 U.S. at 348. Although *Cuyler II* was decided prior to the effective date of Rule 44(c), the Opinion referred both to the proposed rule and case law in reaching this holding. *Id.* at 345-348.

*sas*, 435 U.S. 475 (1978), and *Glasser v. United States*, 315 U.S. 60 (1942). *Holloway* reversed state court convictions obtained after the trial court had denied the motion of unitary counsel, representing three co-defendants, for appointment of separate counsel based upon actual conflicts of interests.

Writing for the *Holloway* Court, Chief Justice Burger held that "an attorney's request for the appointment of separate counsel, based on his representations as an officer of the court regarding a conflict of interests, should be granted." *Id.* at 485. In so holding, however, this Court was clear that in no way was it suggesting that multiple representation was improper, even in the absence of a common defense. Indeed, relying on *Glasser v. United States*, 315 U.S. 60 (1942), *Holloway* reiterated the propriety and significance of multiple representation:

> "One principle applicable here emerges from *Glasser* without ambiguity. *Requiring or permitting a single attorney to represent co-defendants, often referred to as joint representation, is not per se violative of constitutional guarantees of effective assistance of counsel.* This principle recognizes that in some cases multiple defendants can appropriately be represented by one attorney; indeed, in some cases, certain advantages might accrue from joint representation. In Mr. Justice Frankfurter's view: 'Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack.' *Glasser v. United States*, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting)." *Holloway v. Arkansas, supra*, 435 U.S. at 482-83. (Emphasis added).

Given the propriety of multiple representation even absent a common defense, and based on *Holloway* and *Glasser, supra*, *Cuyler II* held that a possibility of conflict from multiple representation is insufficient to warrant a finding that a lawyer's performance was adversely affected and/or ineffective. Justice Powell, writing for

seven members of the *Cuyler II* Court, held that an actual conflict and adverse impact were required to overturn a conviction:

> "We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler II, supra*, 446 U.S. at 350. *Accord: Dukes v. Warden*, 406 U.S. 250 (1972).

It may well be that the *Cuyler II* standard is not easily transferable to pre-trial disqualification proceedings given the likelihood that no adverse impact can then be identified. It may well be that a trial court may utilize some different standard when evaluating pre-trial disqualification motions in multiple representation cases,[9] since interests in addition to those of a defendant are relevant to such pre-trial determination. Nevertheless, the trial and appellate courts below approved the disqualification of counsel chosen to present a common defense based merely on their speculations as to potential conflicts of interest arising from multiple representation. If a pre-trial disqualification can be based merely on such speculation as to potential conflicts, joint representation will be forever banned. As is noted in *Cuyler II* itself:

> "*Holloway* reaffirmed that multiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest. See 435 U.S. at 482. Since

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9. As will be discussed below, given the valid election by each Petitioner to prefer his right to counsel of choice over his right to conflict-free counsel, the trial court had no discretion to disqualify counsel, even had there been an actual conflict *inter sese*. Nonetheless, as is clear in this case, no matter how narrowly construed, *Cuyler II*, *Holloway*, and *Glasser* authorize the presentation of a common defense by unitary counsel. Such authorization cannot be undercut by a trial court's surmise that a conflict of interest may exist or will arise, especially in the face of a valid election of the right to counsel of choice, through the vehicle of a waiver.

> a possible conflict of interest inheres in almost every instance of multiple representation, . . . a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel. Such a presumption would preclude multiple representation even in cases where '[a] common defense . . . gives strength against a common attack.' [*Holloway v. Arkansas*, 435 U.S. 475, 482-83 (1978)], quoting *Glasser v. United States*, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting)." *Cuyler II*, *supra*, 446 U.S. at 348.

No such absolute ban has ever been imposed or favorably viewed by this Court. *Cuyler II* and *Holloway* compel the conclusion that the decision to have one firm represent co-defendants to present a common defense is itself constitutionally protected.

Yet, the appellate court below concluded that "the potential for conflict arising from the firm's receipt of confidential information from all the defendants and its obligations in defending just one of the defendants, perhaps at the expense of the others," PA11, justified the disqualification here challenged. Obviously, the Third Circuit is again utilizing its mere possibility of prejudice or conflict of interest standard, specifically repudiated by this Court in *Cuyler II*, and, in so doing, is obliterating the right of multiple defendants to be represented by single counsel within the Third Circuit, in derogation of *Cuyler II* and *Holloway*.

B. *The Court of Appeals Erred In Holding That Potential Conflicts Resulting From Multiple Representation Required Disqualification of Counsel.*

The Court of Appeals reasoned that the *potential* for conflict of interest required the pre-trial disqualification of counsel, despite the acknowledged voluntary, knowing, and intelligent election of each defendant to give preference to his right to choice of counsel over his right

to conflict-free counsel, unsoiled by any financial considerations.[10] This reasoning directly undercuts the Supreme Court's teaching in *Cuyler II*.

Acknowledging that *Cuyler II* required the presence of an actual conflict before a constitutional defect may be raised post-trial and that a defendant could, prior to trial, elect his right to counsel of choice over his right to conflict-free counsel, and that the Third Circuit itself had followed *Cuyler II* by refusing to set aside a conviction and to allow the withdrawal of a guilty plea which had been entered after a knowing and intelligent waiver of the right to conflict-free counsel, *see United States v. Laura*, 667 F.2d 365, 371-73 (3d Cir. 1981), the Court of Appeals nonetheless attempted to distinguish *Cuyler II* from the case at bar by contending that a valid election of the right to counsel of one's choice over the right to conflict-free counsel, accomplished through a waiver of the latter right, need not be accepted by the trial court:

> "It does not follow, however, that because defendants may waive the right to separate representation free from potential conflicts, they have an absolute right, constitutional or otherwise, to have such waivers accepted by the court." PA9.

No legal authority was presented by the Court of Appeals which agreed with its conclusion. In fact, respecting this point, the court cited two cases, each of which required the *acceptance* of such waivers, and weakly noted: that "we respectfully disagree." PA9.

In reaching its contrary decision, the sole authority referred to by the Court of Appeals was *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978). In *Dolan*, decided

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10. As set forth above, since each Petitioner knew that there were no actual conflicts of interest *inter sese* and that the potential conflicts of concern were caused by the decision to present a common defense and not by multiple representation, there was no conflict to waive; rather, the Rule 44(c) proceeding was the vehicle to assure the trial court that Petitioners' election of his right to counsel of choice and his rejection of his right to separate, conflict-free counsel, was knowingly, voluntarily, and intelligently made.

before *Cuyler II* and *Holloway*, the Third Circuit only held that an actual, irremediable conflict of interest disclosed during a trial permits judicial intervention to preclude a defendant from being represented by chosen counsel. In Dolan, both a Mr. Garofolo and a Mr. Dolan retained one Samuel R. DeLuca, Esquire. After both defendants had entered pleas of not guilty, Garofolo pled guilty on the date set for trial and was subpoenaed by the United States to testify against Dolan as a rebuttal witness. During the course of the representation, the court found the following facts: (1) DeLuca had attempted to negotiate with the government for a dismissal of the indictment against Dolan in exchange for a guilty plea by Garofolo, without Garofolo's knowledge; (2) Garofolo, who had originally perceived no conflict of interest, concluded that he should have separate counsel; (3) Garofolo had been denied effective representation from the outset of DeLuca's representation; (4) DeLuca, as Dolan's lawyer, could not effectively cross-examine his former client, Garofolo — now an important prosecution witness — without intruding into facts learned through the attorney-client relationship; and (5) a clear, actual conflict of interest existed between Garofolo and Dolan. Moreover, *Dolan* presented no common defense issue.

It was only under such circumstances that the Third Circuit, relying upon its supervisory powers to control the conduct of members of the Bar, affirmed the disqualification of DeLuca:

> "We hold that when a trial court finds an actual conflict of interest *which impairs the ability of a criminal defendant's chosen counsel to conform with the ABA Code of Professional Responsibility*, the Court should not be required to tolerate an inadequate representation of a defendant." *United States v. Dolan, supra*, 570 F.2d at 1184 (emphasis added).[11]

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11. In reaching this decision, the Third Circuit distinguished *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975), which had refused to disqualify counsel from multiple representation at a

To be sure, *Dolan* does suggest that a court need not accept a waiver where an *actual*, identifiable conflict exists. Yet the *Dolan* holding flowed from the finding of a specific conflict of interest, in the face of now antagonistic clients who had neither prepared nor presented a common defense. Thus, the issue in *Dolan* was counsel's ability to adequately represent Dolan since, absent a common defense, counsel could not use information obtained from Garofolo to cross-examine him and Garofolo, moreover, had not waived his right to have his privileged communications retain that status. Absent a common defense, Dolan's waiver of his right to conflict-free counsel meant that his lawyer could not effectively cross-examine his chief accuser, thereby necessarily rendering his counsel's performance ineffective. To the contrary, where, as in this case, co-defendants presenting a common defense have chosen their rights to counsel of their choice in lieu of their rights to conflict-free counsel, in order to present a common defense, *Dolan* is irrelevant. *See* Section III, *infra*, at 42.

Most significantly, the trial court in this case found that no actual conflict exists here. Under these circumstances no separate appointment of counsel may be ordered, especially where each Petitioner has chosen to secure his right to counsel of choice. As was held in *United States v. Garcia*, *supra*, 517 F.2d at 276, 277, reversing an order disqualifying chosen counsel from representing defendants on the ground that such counsel also represented unindicted persons who were potential witnesses, *any* conflict of interest arising from multiple representation, whether actual or potential, can be waived

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NOTE — *(Continued)*
pretrial juncture, on the basis that *Garcia* presented only a *possible* conflict of interest, not an actual conflict. *United States v. Dolan*, *supra*, 570 F.2d at 1183. As will be seen below, however, *Garcia* held that both actual and potential conflicts of interest may be waived. Moreover, *Garcia's* facts suggest the existence of an actual conflict of interest.

*pre-trial* in the face of a knowing, intelligent, and voluntary decision by each such defendant to proceed with counsel of his choice.[12]

Since, prior to trial, a defendant can assert his right to counsel of choice over his right to conflict-free counsel through a "waiver" proceeding, it necessarily follows, as in the instant case, that no court may impinge upon a defendant's constitutional right to counsel of his choice and disqualify counsel where such choice has been made, a valid waiver from all co-defendants has been obtained, and defendants determine to present a common defense at trial. No other appellate court has ever held to the contrary. Indeed, as will be seen below, given *Cuyler II* and *Holloway*, every other appellate court addressing this issue has determined that, under such circumstances, no disqualification may occur.

C. *Every Other Appellate Court Which Has Addressed The Issue Has Held That Trial Courts Have No Discretion To Disqualify Counsel Pre-Trial Where Defendants, Represented By One Attorney, Have Each Asserted Their Right To Counsel Of Choice And Rejected Their Right To Conflict-Free Counsel, Even Where Co-Defendants Have An Actual Conflict Of Interest Among Themselves And Are Not Presenting A Common Defense*

The panel opinion cited no appellate court authority in support of its holding. Indeed, it acknowledged that two other circuits had held to the contrary:

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12. "While we find that the record before us does not permit a determination of whether the defendants *did* waive their Sixth Amendment protections, we conclude that they *can* waive such guarantees. . . .

"Our conclusion that defendants may waive the right to conflict-free assistance of counsel abrogates the need on this pretrial appeal to evaluate the actual or potential ineffectiveness of counsel occassioned by alleged conflicts of interest." *Garcia, supra*, 517 F.2d at 277.

"To the extent that the decisions of two other circuit courts require district court acceptance of waivers in cases of potential or actual conflicts of interest, we respectfully disagree. *See, United States v. Armedo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975); *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975)." PA 9.

Subsequent to the filing of briefs in the Third Circuit in this case, other appellate decisions have addressed this very issue, and each of these holdings is contrary to the panel opinion. On this question, the Third Circuit stands alone.

In *United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982), (hereinafter "*Curcio I*"), the Second Circuit vacated a pre-trial order precluding counsel from representing both or either co-defendant, based on the trial court's failure to provide the defendants with an adequate opportunity to establish their desire to go to trial with counsel of their choice, despite the presence of potential conflicts of interest. No common defense was proposed by the defendants.

The government moved to disqualify counsel from representing either defendant, based upon its assertion that the defendants played disparate roles in the crimes alleged, the potential for different defenses for each, and the fact of joint representation. No actual conflict of interest was asserted. In reversing the trial court, the Second Circuit held that the trial court must accept a valid waiver of conflict of interests in order to permit a co-defendant to be represented by counsel of choice, relying on *Cuyler II*:

"The principle that the right to separate representation may be waived finds its most recent support in the Supreme Court's decision in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), in which the same pair of retained attorneys represented three defendants charged with murder. The Court ruled that the mere fact of the multiple representation was not sufficient to establish a violation of Sixth Amendment rights, nor even to alert the state trial court that there might be need for

an inquiry into potential conflicts of interest. The Court stated that '[a]bsent special circumstances, . . . trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist.' *Id.* at 346-47 (footnote omitted). The Court construed its earlier decision in *Holloway v. Arkansas*, *supra*, as confirmation that multiple representation is not impermissible:

> '*Holloway* reaffirmed that multiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest. See 435 U.S., at 482. Since a possible conflict inheres in almost every instance of multiple representation, a defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial. But unless the trial court fails to afford such an opportunity, a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel. *Cuyler v. Sullivan*, *supra*, 446 U.S. at 348, 100 S.Ct. at 1718.' "
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> *Curcio I*, *supra*, 680 F.2d at 886.

Holding that an attorney may represent more than one defendant in a criminal prosecution if the defendants knowingly and wilfully so elect, despite the potential conflicts lurking in the background, the *Curcio I* court also stated:

> "Notwithstanding the considerable dangers, however, the teaching of the Supreme Court in *Glasser*, *Holloway*, and *Cuyler* is that defendants may, if they act with their eyes open, elect to be represented jointly by a single attorney. The recently adopted Fed.R.Crim.P. 44(c), . . . does not eliminate the defendant's power to waive his right to be represented by a conflict-free attorney. While the rule imposes on the trial court the duty to make prompt inquiries and to advise the jointly represented defendants as to their

> rights to separate representation, it does not forbid joint representation. It merely requires that where a conflict may arise 'the court shall take such measures as may be appropriate to protect each defendant's right to counsel.' Given the constitutional dimension of the defendant's right to counsel of his own choosing, if the defendant makes a knowing and intelligent election to pursue that right in preference to his right to an attorney of undivided loyalty, disqualification would not protect the Sixth Amendment right that the defendant asserts and would not be 'appropriate.'" *Curcio I*, *supra*, 680 F.2d at 887-88.

*Curcio I* remanded the case to the trial court for further proceedings to determine whether the defendants' waivers of their right to conflict-free counsel were knowing and intelligent.

In accordance with the *Curcio I* decision, the trial court then conducted an extended Rule 44(c) hearing, after which it precluded counsel from representing both defendants, finding that a defendant's waiver of conflict of interest had not been intelligently made. On appeal, the Second Circuit again reversed, finding that the appellate court had full *de novo* powers of review not only over the question of whether the waiver standard applied by the trial judge was correct but also as to whether the trial court misapplied the applicable standard. *United States v. Curcio*, 694 F.2d 14, 22 (2d Cir. 1982) (hereinafter "*Curcio II*").[13]

In reaching the merits, Judge Friendly, writing for the Second Circuit, began with an analysis of the two conflicting constitutional rights at issue: the right to counsel of one's choice and the right to conflict-free counsel, and noted that the government must not be permitted to choose one right over the other for a defendant:

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13. Thus, the Second Circuit, in *Curcio II*, disagreed with the standard of review adopted by the Third Circuit in this case — abuse of discretion by the trial Court.

"The first step toward decision in this case is to recognize that we are dealing not with a garden-variety case of 'waiver', say, of the privilege against self-incrimination, but rather wth a conflict of two constitutional rights, to wit, the right of a criminal defendant to be represented by counsel of his own choice and the right of such a defendant to counsel whose effectiveness is unimpaired by divided loyalty. What makes the case especially troubling is that the latter right is asserted not by the defendants, who wish to walk away from it, but rather is asserted against them by the Government, whose appropriate concern is simply in avoiding interruption of the trial and in obtaining convictions free from appreciable threat of successful attack. Mere statement would seem sufficient to suggest that a close case should be resolved in favor of those whose liberty is at stake." *Curcio II*, *supra*, 694 F.2d at 22 and n.8.

[n.8] "*It seems to us that a case where a defendant is vigorously asserting his right to counsel of his choosing is not truly a case of 'waiver' at all; it is, rather, a decision to assert one constitutional right rather than another.* See *Kaplan v. Bombard*, 573 F.2d 708, 714 (2 Cir. 1978). Cf. *United States ex rel. Konigsberg v. Vincent*, 526 F.2d 131, 132-34 (2 Cir. 1975), *cert. denied*, 426 U.S. 937, 96 S.Ct. 2652, 49 L.Ed. 2d 388 (1976) (assertion of right of self-representation). This is more than a semantic quibble; characterizing the Curcios' choice as one of 'waiver' of the right to conflict-free representation invites judicial scrutiny that is excessively paternalistic and insufficiently protective of the competing right to counsel of choice." (Emphasis added).

Relying on *Glasser*, *Holloway*, and *Cuyler II*, *supra*, the Second Circuit held that the right to counsel of one's choice through joint representation includes the right of a defendant to determine the defense which he

will present and the manner in which that defense can be most effectively presented:

> "The right claimed by the Curcios thus is not merely the right to have their defense conducted by a lawyer who has long represented them, in whose skill and judgment they have confidence, important as that right is, but the right to present their defense in what they have reasonably concluded to be the most effective fashion." *Curcio II*, *supra*, 694 F.2d at 24.[14]

Having reestablished for the second time in the same case the constitutional right of the co-defendants to joint representation by counsel of their choice, as opposed to separate counsel, even absent a common defense, Judge Friendly, relying on the attorney's faithful performance of his professional duty not to "continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be and is likely to be adversely affected," determined that joint representation must be permitted:

> "Some weight also should have been given to [the attorney's] desire to continue the joint representation. In *Curcio I*, *supra*, 680 F.2d at 887-88 n.3, Judge Kearse pointed out that an attorney has an independent professional duty not to 'continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in

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14. In this regard, Judge Friendly opined:

"[T]he judge, much less the prosecutor, is *not* to assume too paternalistic an attitude in protecting the defendant from himself. *Cf. Michigan v. Mosely*, 423 U.S. 96, 108-09 (White, J., concurring) . . . [T]he defendants' choice is to be honored out of respect for them as free and rational beings, responsible for their own fates. It is the defendants, not the judge or prosecutor, who will bear the personal consequences of a conviction. [*Faretta v. California*] 422, U.S. [806] at 834, 95 S.Ct. [2525] at 2540.

representing differing interests . . . .' ABA Disciplinary Rule 5-105(B). [The attorney], no tyro in the criminal practice, had thus been alerted to his responsibilities and knew the consequences of a breach; he had conferred repeatedly with his clients and we must assume that he had satisfied himself. See *Cuyler v. Sullivan*, *supra*, 446 U.S. at 346-47, 100 S.Ct. at 1717." *Curcio II*, *supra*, 694 F.2d at 27-28.

In the case at bar, of course, the Third Circuit merely acknowledged that such concerns had been discussed with Petitioners by counsel, giving no weight whatsoever to the fact that counsel had determined that it could properly and ethically proceed with joint representation and that it should proceed with such representation in the best interests of the Petitioners.

Thus, *Curcio I* and *Curcio II* hold that, even absent a common defense, a defendants' constitutional right to counsel of his choice must be accepted, and that his concomitant decision to "waive" and thereby forego his right to conflict-free counsel, must be respected. Indeed, the very purpose of the waiver proceeding is to create a record of the voluntary election of one constitutional right over the other, thereby protecting the trial and appellate courts from baseless litigation based on claims of ineffective assistance of counsel due to multiple representation.

The *Curcio* decisions were presaged by *United States v. Cunningham*, 672 F.2d 1064 (2d Cir. 1982). In *Cunningham*, the trial court, pre-trial, had rejected the defendants' election of their right to counsel of choice by refusing to accept their waiver of their right to conflict-free representation, and thereupon disqualified defendants' counsel. The Second Circuit reversed this disqualification order, even though an *actual* conflict of interest among the co-defendants was present and had been identified. Observing that the right of a criminal defendant to be represented by retained counsel is "a right of constitutional dimension," and that such a right

ought "not be unnecessarily obstructed by the court," *id.* at 1070, the Court of Appeals held that where the constitutional rights of the defendant to choice of retained counsel and conflict-free representation clash, it is the defendant's choice which will then govern:

> "[I]f Cunningham's right to counsel of his choice conflicts with his right to an attorney of undivided loyalty, *we think the choice as to which right is to take precedence should be left to Cunningham and not be dictated by the government.*" *Id.*, at 1073. (Emphasis added). *Accord: Curcio I, supra*, 680 F. at 885.

The Second Circuit, unlike the Third Circuit, does not stand alone on this issue. In *United States v. Agosto*, 675 F.2d 965 (8th Cir. 1982) *cert. denied* 103 S.Ct. 77 (1983), six defendants represented by three counsel appealed from pretrial disqualifications of counsel of their choice based upon the government's assertion of conflict of interest claims, arising both from prior counsels' representation of interested persons and multiple representation of co-defendants. In this latter regard, the *Agosto* court ruled that the trial court in holding that the co-defendants, if jointly represented, could possibly present inconsistent defenses, had abused its discretion in its disqualification of counsel, reasoning that the defendants' assertion that they intended to present a common defense rendered such concern moot:

> "In the criminal context, disqualification on the basis of the attorney's receipt of privileged information from a codefendant formerly represented by that attorney should only be considered upon a clear showing that the present and former clients' interests are adverse. Here, there has been no such showing. . . ." *Id.* at 973.

However, even were a common defense not advanced and an actual conflict found to be present among the co-defendants, the Eighth Circuit nonetheless refused to establish a *per se* rule requiring disqualifications of Counsel:

"Assuming that after further inquiry the district court is satisfied that a clear showing has been made that the interests of defendants Bruins and Newstrum are adverse to the interest of Gustafson, we instruct the district court to consider whether there exists a means of eliminating the potential conflict less burdensome than disqualification. As we noted earlier, a client may consent to his former attorney's representation of adverse interests. . . .

"We note that Bruins and Newstrum never filed a motion for Walters' disqualification and never actively supported the government's motion. Under these circumstances, we hold that the district court should inquire of defendants Newstrum and Bruins as to their willingness to consent to Walters' continued representation of Gustafson, and use of backup counsel.

"If Newstrum and Bruins are willing to consent, we see no reason to reject Gustafson's proposal to employ a backup counsel as a satisfactory resolution of the conflict. If they do not consent, however, and there is a clear showing of adverse interests* then we concur in the district court's exercise of discretion and disqualify attorney Walters."

*"If the district court determines that the interests of the defendants are not adverse, it will only be because all defendants, including Bruins and Newstrum, represent that *they intend to present a joint defense and that there are, therefore, no conflicts of interest*. Under these circumstances, we consider it appropriate to require Bruins and Newstrum to execute an informed consent to Walters' continued representation of Gustafson, and use of backup counsel if necessary. In this way, the interest of the district court in insuring the integrity of the proceedings from post-conviction attack will be protected should the defendants prove wrong in their assessment of trial strategy."

*United States v. Agosto, supra*, 675 F.2d at 973-974, and n.9 (Other footnotes omitted).

Thus, the Second Circuit in *Curcio I* and *II* and *Cunningham;* the Fifth Circuit in *United States v. Garcia, supra;* and the Eighth Circuit in *Agosto* have each held that through the vehicle of a *pre-trial waiver*, defendants can choose to secure their right to counsel of choice in the face of potential and even actual conflicts of interest based upon joint representation of defendants charged in the same action.[15] These courts have recognized that this choice is binding and *must* be accepted by the trial court and that a defendant may stand on his Constitutional right to go to trial with counsel of his choice.[16] And it is worth emphasizing that none of these cases, save *Agosto*, dealt with common defenses.

Where trial strategy is bottomed on a common defense, by definition, there can be no conflicts of interest.

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15. In *Smith v. Bordenkircher*, 671 F.2d 986 (6th Cir. 1982), *cert. denied*, 103 S.Ct. 107 (1983), a post-trial attack on state court convictions, the reported opinion does not discuss whether any pretrial waiver proceeding occurred. In *Smith*, the court relied on *Cuyler II* in holding that a lawyer representing multiple criminal defendants need not withdraw as counsel for the remaining defendants where one defendant turns state's evidence, thus creating a potential conflict of interest:

> "This two part test [of *Cuyler II*] does not permit the formulation of strict rules against a lawyer's continued representation of remaining co-defendant's if an indicted former client pleads guilty and cooperates with the prosecution. Rather, the *Cuyler* test directs us to determine, on the facts of each case, whether there is an actual conflict of interest and whether that conflict has caused ineffective performance in violation of the provisions of the Sixth Amendment . . ." *Id.* at 987.

16. Interestingly, the Third Circuit has so held as well in *United States v. Laura*, 667 F.2d 365, 371-73 (3rd Cir. 1981). Thus, in order to distinguish the instant case from *Laura*, the court in this case fallaciously reasoned that a waiver, sufficient to preclude a post-conviction attack for actual prejudice shown, is somehow insufficient to support a pretrial constitutionally protected choice to have retained counsel present a common defense. *See* PA8-PA9.

*United States v. Agosto, supra*, 675 F.2d at 974, n.9. Therefore, the incorrectness and impropriety of the panel opinion below is all the more glaring. What makes the opinion even more suspect is its reliance on a mere procedural rule, and not on any right of constitutional dimension.

## II.

## FEDERAL RULE OF CRIMINAL PROCEDURE 44(c)

### A. *Rule 44(c) Merely Provides A Procedure To Assure The Court That Co-Defendants Assertion Of Their Right To Counsel And Their Rejection Of Their Right To Conflict-Free Counsel Have Done So Voluntarily, With Awareness Of Actual Or Potential Conflicts And Available Alternatives To Multiple Representation*

As is set forth in *Cuyler II, supra*, the Rule 44(c) inquiry is *not* of constitutional dimension. Were it otherwise, then the state court in *Cuyler II* would have been compelled, on Sixth Amendment grounds, to hold a Rule 44(c) hearing. Thus, Rule 44(c) provides a procedure by which a court, through the exercise of its supervisory powers, can assure itself that co-defendants who choose to be represented by one attorney in order to obtain counsel of their choice and who choose to relinquish their right to conflict-free counsel act knowingly and intelligently, thereby assuring that the record of that choice is sufficient to withstand any post-conviction challenge, should such challenge arise. The Rule states:

> "Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel."

The right to counsel which the Rule is designed to protect has two prongs, each bottomed on the Constitution: the defendant's right to counsel of choice and the defendant's right to conflict-free counsel. Since both rights

belong to the defendant, the defendant must be able to choose which of these rights is to predominate where the rights conflict. The Rule is silent respecting "appropriate measures" where the exercise of the right to counsel of choice raises the spectre that counsel may not be conflict-free. Nonetheless, counsel is unaware of any appellate case, save the case at bar, which upheld a lower court's disqualification of unitary counsel chosen by co-defendants who wished to present a common defense through that counsel, nor does the committee note, or cases cited therein, provide any support whatsoever for such judicial action. This should not be surprising since "to protect each defendant's right to counsel," the trial court must give full weight to the defendant's choice of counsel when the defendant gives preference to his right to choice of counsel over his right to conflict-free counsel.

Moreover, it necessarily follows that the Rule itself cannot be authority for the harsh sanction authorized by the trial and appellate courts below, since the Rule was not intended to affect substantive rights of constitutional dimension but was rather designed to secure uniformity and simplicity of criminal procedures and to assure that each defendant in a federal criminal action understands and appreciates both aspects of his Constitutional right to counsel, and voluntarily selects one prong over the other.[17]

Since the rule does not and cannot alter the substantive law respecting the power of the trial court to order appointment of separate counsel, the "appropriate measures" which may be taken even where there is good cause to believe a conflict likely to arise cannot include

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17. The Federal Rules of Criminal Procedure are rules of procedure which cannot substantively alter constitutional rights. *See United States v. Schwartz*, 372 F.2d 678, 682 (4th Cir. 1967).

the disqualification of counsel here ordered,[18] where co-defendants desiring to present a common defense clearly select that right over their right to conflict-free counsel.

Where Petitioners find particular fault with the trial court's use of Rule 44(c), as affirmed by the appellate court, is in the trial court's interpretation of its obligation, under that Rule, to "protect each defendant's right to counsel" once it is determined that a conflict is likely to arise. Without recognizing that the "right to counsel" encompasses the right to counsel of one's choice as well as to conflict-free representation, and without acknowledging the right of each Petitioner to choose which of these rights is more important to him in this case, both courts read that portion of the Rule as requiring the trial court only to determine at a preliminary stage of the proceeding whether a conflict will likely occur at some future point in the proceedings, and to disqualify counsel based only on that potential "conflict."

There is nothing in the language of the Rule itself which permits, let alone requires, a court to override each Petitioner's selection of his right to counsel of choice and his rejection of his right to conflict-free representation. Although the terminology utilized in connection with Rule 44(c) proceedings is that of "waiver," in fact, that terminology is somewhat misleading, for the matter at issue in such a proceeding is the election by

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18. Petitioners submit that "appropriate measures" authorized by the Rule where a conflict of interest is found *likely* to arise among co-defendants include: specific advice as to the nature, purpose, and scope of the right to separate counsel; the right to have counsel appointed if financial considerations are at issue; and the taking of a valid waiver in order to assure that a defendant's right to counsel of his choice is preserved, all to demonstrate that defendants are voluntarily and intelligently asserting their right to be represented by one attorney, and to further create a record of the defendants' intelligent waiver of their right to conflict-free counsel, in order to protect against any post-conviction attack.

each defendant of one constitutional right and the rejection of the other. Furthermore, the Rule does not even mention disqualification as a prophylactic measure to assure conflict-free representation. Thus, in exercising its supervisory power to protect a defendant's right to counsel under Rule 44(c), it is submitted that courts must respect a defendant's choice. If either of the courts below had so acted, no disqualification of counsel would have occurred.

In interpreting Rule 44(c) as a command to determine whether to permit joint representation rather than as a command to take such steps as may be appropriate to protect the Petitioners' rights to choice of counsel, the courts below gave the Rule a gloss which simply cannot pass constitutional muster. The Supreme Court has made it clear that once defendants have been advised of the perils of joint representation, the court cannot presume, that "the *possibility* for conflict . . . results[s] in ineffective assistance of counsel." *Cuyler II*, *supra*, 446 U.S. at 348. The fact that Rule 44(c) directs district court judges to protect the right to counsel, then, does not justify the denial of Petitioners' right to counsel of their choice. Under Rule 44(c), the trial court is to advise co-defendants of the two prongs of their constitutionally protected right to counsel in order to assure that each co-defendant intelligently and voluntarily exercises his freedom of choice as to which right he wishes to protect. This is the purpose of the Rule and the reason for conducting, pretrial, the Rule 44(c) proceeding. Once a co-defendant makes his choice, and once the court is satisfied that the election is a voluntary and intelligent one, the defendant's decision must be honored. Most certainly, that decision cannot be undermined or rejected based on non-existent spectres of potential conflicts lurking only in the recesses of the trial court's mind. It is strange indeed that a Rule which is designed to protect a defendant's right to choice is used by the Third Circuit, in this case, to defeat that very right.

It cannot be overemphasized that, in the case at bar, there are no conflicts of interest. Thus, no Petitioner was compelled to waive any right to conflict-free counsel, for counsel is conflict-free. These facts, too, were disregarded by the trial court and underscore the incorrectness and offensiveness of the trial court's refusal to permit Petitioners to proceed with counsel of their choice.

This absence of any conflict also establishes that the disqualification of counsel appealed from in this case cannot be premised upon the trial court's responsibility to supervise the members of its Bar. Counsel recognizes full well that the ethical standards of the Bar discourage joint representation of multiple defendants in most instances. In recognition of those standards and the obligations imposed by them, counsel undertook a searching inquiry, some of which was described to the trial court, after which counsel determined that no conflict of interest exists among Petitioners and so represented to the trial court. Counsel further determined that, under the facts of this case, it could give its undivided loyality to each Petitioner. As a result, there is absolutely no predicate relating to the court's responsibility to supervise the members of its Bar upon which the disqualification of counsel can be based. Moreover, it is important to note that the ethical standards do not, and cannot, erect a *per se* rule prohibiting multiple representation. *See* ABA Standards Relating to the Defense Function, at 235, commentary.

As the decisions in *Cuyler II*, *Curcio I* and *II*, and *Cunningham*, *supra*, made clear, given the weight which must be placed on the integrity of counsel and the right of each co-defendant to prefer one aspect of his constitutional right to counsel over the other, neither the government's nor the court's generalized concern for standards of the Bar can be employed to obliterate a defendant's right to counsel of his choice. *See, e.g.*, *United States v. Cunningham*, *supra*, 672 F.2d at 1073. Similarly, in this case, Petitioners, in order to present a

common defense, have stated their avowed intention to fully and freely make themselves available to each other and each other's counsel, should they be denied their unitary counsel of choice to present that common defense. A43. Their assertion of their right to counsel of choice and their rejection of their right to conflict-free counsel is crystal clear on the record. Under these circumstances, permitting counsel chosen by Petitioners to present their common defense eradicates any appearance of impropriety and fully protects the integrity of the system and the interests of the Petitioners themselves.

B. *Rule 44(c) Cannot Deprive Petitioners Of Their Sixth Amendment Right To Retain Counsel Of Their Choice*

The Order appealed from undermines the rights of co-defendants to counsel of their choice. In *United stated v. Armedo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975), the Second Circuit reversed an order disqualifying retained counsel on conflict grounds, stating:

> "[T]he district court did not give sufficient weight to the appellants' rights. Although the right to an attorney of one's choosing is not unlimited, the Sixth Amendment does give some protection to a criminal defendant's selection of retained counsel. . . . *Cf. Faretta v. California*, 422 U.S. 806, 95 S.ct.2525.45L.Ed.2d v 562 (1975), holding that there is a constitutional right to proceed pro se, and observing that the right to manage one's own defense is at the heart of the Sixth Amendment guarantees. . . . The client, however, may waive his Sixth Amendment rights to effective assistance of counsel . . . just as he may knowingly and intelligently waive any constitutional rights." *Id.* at 592. [Citations omitted].

And in *United States v. Garcia, supra*, city police officers, charged with federal offenses, including 18 U.S.C. §§241 and 242, obtained private counsel. Two officers retained one attorney; the remaining seven retained two attorneys who, in addition, represented fifteen other po-

lice officers who would likely testify at trial, many of whom had testified before the grand jury. In reversing the trail court's pre-trial Order disqualifying the three lawyers from any representation of the nine defendants, the Fifth Circuit assumed actual conflicts engendered from multiple representation, but held nonetheless that such conflicts could be waived:

> "We hold only that if, as a matter of fact, a defendant after thorough consultation with the trial judge knowingly, intelligently and voluntarily wishes to waive (the right to conflict-free representation, the Constitution does not prevent him from so doing." *United States v. Garcia, supra*, 517 F.2d at 278.[19]

Thus, the Second, Third, Fifth, Sixth, and Eighth Circuits have placed their imprimatur upon a defendant's right to determine whether his right to counsel of choice is more important to him than his right to conflict-free counsel in multiple representation cases after an inquiry, patterned on Rule 44(c), establishing the constitutionally requisite predicates for such a choice. Moreover, in *Cuyler II*, the Supreme Court noted that the Rule 44(c) inquiry was not of constitutional dimension. Therefore, it is clear that Rule 44(c) does not expand upon the powers of the trial court to disqualify counsel from multiple representation of co-defendants in a criminal action. Rather, the Rule merely sets forth procedures to be followed in order to assure that each defendant understands both prongs of his Sixth Amendment right to counsel and that his election is a voluntary and intelligent one, thereby precluding any post-conviction attack based on the joint representation. Once a defendant has made such choice, the courts mus. recognize that the choice is constitutionally protected, and must act to assure that the defendant's decision is honored.

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19. *Accord*: *Curcio I*, *Curcio II*, *Cunningham*, *Smith*, *Laura*, and *Agosto*, *supra*, each decided post-*Cuyler II* and *Holloway*. *Garcia* and *Amedo-Sarmiento* were decided prior to *Cuyler II* and *Holloway*.

## III.

## THE TRIAL AND APPELLATE COURTS DENIED PETITIONERS THEIR RIGHT TO HAVE THEIR COMMON DEFENSE PRESENTED BY COUNSEL OF THEIR CHOICE

By denying Petitioners their constitutionally protected right to counsel of their choice, despite the absence of any conflicts among them, the trial and appellate courts ignored the fact that, by their rulings, they severely compromised and jeopardized Petitioners' constitutionally protected right to present a common defense through a specific lawyer and failed to recognize that no basis for disqualification exists where the sharing of privileged information occurs solely as a result of the presentation of a common defense by counsel representing multiple defendants.

A. *The "Joint Defense" Rule*

Where privileged information is disclosed by a defendant or his counsel to co-defendants or their counsel to facilitate the presentation of a common defense, such disclosure is not a waiver of the attorney-client privilege, not does such information-sharing constitute a conflict of interest or result in ineffective assistance of counsel.

(1) *Pooling Information Does Not Waive The Attorney-Client Privilege*

*Continental Oil Company v. United States*, 330 F.2d 347 (9th Cir. 1964), was the first federal case to recognize the "joint-defense exception" to waiver of the attorney-client privilege. Employees of Standard Oil and Continental Oil had been subpoenaed to appear before a grand jury. Attorneys for each corporation had represented their employee-witnesses individually. Before and after grand jury testimony, the employees for both companies were interviewed by their attorneys, who then prepared and exchanged memoranda on the briefing and debriefing sessions. Prior to returning indictments, subpoenas duces tecum were issued to obtain

the memorandum. Motions to Quash were filed, based on the attorney-client privilege.

In quashing the subpoenas, the Court found no waiver of the privilege, stating:

> "[Counsel] exchanged such memoranda in confidence in order to apprise each other as to the nature and scope of the inquiry proceeding before the grand jury . . . in order to make their representation of their clients in connection with the grand jury investigation and any resulting litigation, more effective." *Id.* at 348-49.

This "common defense" rule has been recognized as a time honored tenet of state law. As was noted in *United States v. McPartlin*, 595 F.2d 1321 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979), in precluding compelled disclosure of statements made by a co-defendant to defendants' attorney and investigator, the Seventh Circuit summarized the rule as follows:

> "[C]ommunications by a client to his own lawyer remain privileged when the lawyer subsequently shares them with co-defendants for purposes of a common defense. The common-defense rule . . . has been recognized in cases spanning more than a century. Uninhibited communications among joint parties and their counsel about matters of common concern is often important to the protection of their interests. In criminal cases it can be necessary to a fair opportunity to defend. Therefore, waiver is not to be inferred from the disclosure in confidence to a co-party's attorney for a common purpose." *Id.* at 1336. (citations omitted) *Accord: In re LTV Securities Litigation*, 89 F.R.D. 595, 604 (N.D. Tex. 1981)

Since pooling of information by co-defendants jointly charged but separately represented does not create a conflict of interest or result in ineffective assistance of counsel, there is neither logic nor case law to support a different conclusion solely because such co-defendants are represented by counsel associated with one firm.

The only additional question raised by co-defendants jointly charged pooling information in order to present a common defense is under what circumstances, and by whom, may the attorney-client privilege be waived and what occurs, in the common defense situation, when one defendant so represented decides to turn on his co-defendants? To this queston, we now turn.

(2) *If A Common Defense Breaks Down, Co-Defendants May Use Privileged Information Obtained From Each Other Relevant To The Charges Lodged.*

*In the Matter of a Grand Jury Subpoena Duces Tecum*, 406 F.Supp. 381 (S.D.N.Y. 1975), attorneys were served with a grand jury subpoena seeking memoranda of interviews conducted by them in connection with an SEC investigation and a subsequent civil action involving securities fraud schemes. The attorneys declined to produce the documents, relying on the attorney-client and work product privileges. The Court held that the memoranda were subject to the attorney-client privilege since they reflected statements made at interviews designed to promote the joint defense of the persons interviewed. In these regards, the Court stated:

"[W]here there is consultation among several clients and their jointly retained counsel, allied in a common legal cause, it may reasonably be inferred that resultant disclosures are intended to be insulated from exposure beyond the confines of the group; that inference, supported by a demonstration that the disclosure would not have been made but for the sake of securing, advancing or supplying legal representation, will give sufficient force to a subsequent claim to the privilege. . . .

"*To be sure, what is divulged by and to the clients present at such a meeting cannot be deemed to be confidential inter sese; in any later controversy between or among those clients, the privilege could not stand*

*as a bar to full disclosure at the instance of any one of them." In Re Grand Jury, supra*, 406 F. Supp. at 386. (Emphasis supplied). *Accord: Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 29 (N.D. Ill. 1980). Thus, while disclosures made among and between the parties in connection with a joint defense are immune from discovery to the outside world, the cost to defendants for such protection is that defendant "A" cannot raise the privilege to bar defendant "B" from using information gained from defendant "A" in the event the joint defense breaks down and defendant "B" adopts a position hostile to defendant "A":

> "The attorney-client privilege as noted above, is no less vital to the functioning of a joint defense than it is to the proper course of wholly independent representation. Nevertheless, in at least the one aspect already examined, the law exacts a higher cost for participation in a joint defense. To be sure, confidences shared by joint defendants and their counsel are effectively shielded from outside access. On the law established to date, that shield may be lowered only when the parties once joined assume the stance of opposing parties in subsequent litigation. This restructuring of the parties' rights is a logical incident of their later posture: when they face one another in litigation, neither can reasonably be allowed to deny to the other the use of information which he already has by virtue of the former's own disclosure." *In The Matter of a Grand Jury Subpoena, supra*, 406 F.Supp. at 394.

Similarly, in *In Re LTV Securities Litigation, supra*, the court held that a corporation could assert the attorney-client privilege against shareholders' attempts to discover materials generated by various corporate attorneys in the course of conducting an internal investigation begun after the Securities and Exchange Commission had filed charges against the corporation. In the course of its opinion, the court held that the privilege applied against outsiders based upon the "joint defense

privilege," but that if the parties had a falling out, only joint invocation of the attorney-client privilege would preserve the privilege:

> "Even should such allies later become estranged, they would arguably still be entitled *jointly* to invoke the attorney-client privilege to protect shared confidences from disclosure at the behest of a third party." *Id.* at 604, 605. (Emphasis supplied)."

*LTV* relied on *In the Matter of a Grand Jury Subpoena*, *supra*, for the proposition that the attorney-client privilege cannot shield full disclosure in controversies among and between defendants themselves; rather, the privilege serves to bar discovery only against the "rest of the world." *Id.* at 605.[20]

Thus, in cases in which defendants jointly accused desire to prepare a common defense, and to make themselves available to one counsel representing all co-defendants or to various counsel, each representing individual defendants, for that purpose, the transfer of information among and between the parties and their counsel is not deemed to effect a waiver of the attorney-client privilege. Indeed, the privilege remains inviolate. However, if there is a falling out among the co-defendants who had shared information for a common defense, so that a co-defendant determines to proceed in the absence of a common defense, the remaining co-defendants are free to waive the privilege and use all the information obtained in connection with the preparation of the common defense against the now adverse co-defendant.

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20. The burden of establishing the foregoing rests on the claimant seeking to assert the privilege and its scope should be "strictly confined within the narrowest possible limits." 8 Wigmore, *Evidence*, §2291, at 554 (McNaughton rev. 1961); *United States v. Goldfarb*, 328 F.2d 280 (6th Cir.) cert. denied, 377 U.S. 976 (1964); *United States v. Schmidt*, 360 F.Supp. 339 (M.D.Pa. 1973); *see Radiant Burners, Inc. v. American Gas Association*, 320 F.2d 314 (7th Cir. 1963).

This same conclusion adheres even where the co-defendant becomes a witness for the government. In *Olshen v. McMann*, 378 F.2d 993 (2d Cir.) *cert. denied*, 389 U.S. 874 (1967), in which the attorney for the defendant had previously represented the government's chief witness, the Court held that the witness' disclosure to the government effected a waiver of any claim to confidentiality respecting communications to his attorney. *Accord: Smith v. Bordenkircher, supra*; *United States v. Pilnick*, 267 F.Supp. 791, 798 n.16 (S.D.N.Y. 1967)

This result necessarily flows not only from the cases cited above but also from an analysis of the nature of the attorney-client privilege itself. Where a lawyer represents a single client, the attorney-client privilege is that of the client and may be waived by that client. Where a lawyer represents many co-defendants who pool information in order to present a common defense, the attorney-client privilege is that of each of the co-defendants, and may be waived by any one of them. The distinction is that where one such co-defendant waives the attorney-client privilege, that waiver is applicable to all the co-defendants, for that co-defendant is free to disclose all he learned from the other co-defendants in connection with the preparation of the common defense. That risk is a risk inherent in the presentation of a common defense. It is submitted that this risk ought be spelled out to co-defendants by counsel, and be part of any inquiry conducted by a trial court where a common defense is to be raised. It must be reiterated, however, that the attorney-client waiver question, in those cases where a common defense is raised, is wholly unrelated to multiple representation and cannot serve as the basis for disqualification of counsel representing multiple defendants.

(3) *If A Common Defense Breaks Down, The Privilege Question Posed Is Identical Whether Co-Defendants Had One Counsel Or Multiple Counsel*

The trial court believed that a conflict might arise if the common defense broke down, thereby precluding counsel from cross-examining the estranged defendant:

"Q. Now, in the event that you are wrong and one of the other defendants should decide to turn tail, do you realize that if that defendant were to take the stand, if you were represented by separate counsel your attorney would have the right to cross-examine that person. If you are represented, all of you, by the same attorney, you could not expect the one attorney who had represented this person to cross-examine him, could you?

"A. No, Sir.

"Q. So that you would run the risk by single representation that if you are wrong in your assessment of all the defendants being willing to stand together throughout, you would be giving up a chance for cross-examination of one of your co-defendants if he should take the stand?

"A. Under those conditions, yes sir." PA47-PA48

The trial court based its disqualification order on this premise. PA30-PA31. The Third Circuit never discussed this issue. It is submitted that, for the reasons set forth above, the trial court's statements of the applicable law, as set forth in the above-quoted colloquy, were erroneous since the breakdown of the common defense *would* permit each co-defendant to use privileged information in the cross-examination of an estranged defendant, and that, for this additional reason its disqualification order must be overturned.[21]

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21. In this regard, it must be noted that this error of law may have invalidated the colloquy. On the record as it now stands, no Petitioner was advised either that information obtained through the attorney-client relationship could be used against an estranged defendant, or that an estranged defendant could use information so obtained against each Petitioner. This failure might, theoretically, render invalid each waiver obtained in the trial court. Thus on remand, the trial court should conduct a subsequent colloquy to formally advise Petitioners of these facts, although no conflict exists among Petitioners as each has presented information to counsel exculpatory to each and to the other Petitioners.

Nonetheless, regardless of the appropriateness of the trial court's comments, the legal question posed is the same whether the privileged information is divulged by each co-defendant to one firm representing *all* co-defendants or by each co-defendant to all separate counsel in connection with the preparation of a common defense. Since the same so-called "conflict" — the exchange of confidential information — is present in either circumstance, it necessarily follows that the spectre of that "conflict" cannot serve as a predicate for disqualifying counsel here. To hold otherwise would disqualify any counsel from ever representing any defendant where a common defense was initially decided upon as the trial strategy to be employed, for the possibility that any one defendant may turn on his co-defendants will always exist.[22]

## IV.

## THE POTENTIAL CONFLICTS IDENTIFIED BY THE TRIAL AND APPELLATE COURTS ARE NOT CONFLICTS OF INTEREST ARISING FROM MULTIPLE REPRESENTATION

As set forth above, Petitioners determined that they should present a common defense in order to gain strength against a common attack. They chose the firm of Sprague & Rubenstone as the vehicle through which their desires would be best implemented. Nonetheless, had they each retained separate counsel, in whom they reposed less trust and confidence, the same information would have been shared among and between co-defen-

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22. Here, were one defendant to turn on his co-defendants, counsel would necessarily cease its representation of such adverse defendant or the remaining defendants, not because of a "conflict" engendered by receipt of privileged information, but because of an actual conflict caused by divergent defense postures and counsel's resultant inability to adequately and effectively represent all defendants. *United States v. Dolan, supra*. *See* DR5-105.

dants and their counsel in order to secure the best possible presentation of the common defense. PA43. Moreover, the shared information disclosed the absence of any conflict, since each Petitioner has asserted his innocence, has related exculpatory information both as to himself as well as to his co-defendants, possesses no incriminating information relating to himself or any other Petitioner, and possesses no information inconsistent with that possessed by any other Petitioner.

Despite the constitutional protection surrounding their choice of counsel, the Third Circuit precluded any Petitioner from having counsel of his choice finding that the trial court's decision to "take the initiative and exercise its discretion to avoid a serious potential for conflict before jeopardy attaches," PA25, was within its discretion. However, upon reasoned analysis, it becomes apparent that these "potential conflicts" identified by the trial courts below are not conflicts of interest resulting from multiple representation; rather, they are the inevitable results of joint strategies employed in connection with the presentation of a common defense, which strategies cannot properly be considered or questioned by any court during the course of a Rule 44(c) inquiry. For example, considering the eight (8) points set forth in the trial Court's Opinion, PA14-PA15, constraints imposed on counsel representing multiple co-defendants in a criminal action in connection with opening and closing statements, sentencing, possible grants of immunity, and a defendant's exercise of his right to testify are all constraints arising as well, and to similar degrees, in instances of a common defense agreed upon by co-defendants represented by separate counsel. Further, these constraints to the extent they do exist, grow out of tactical decisions made by counsel and their clients, are inextricably intertwined with the determination to present a common defense and the election to be represented by one attorney, are decisions which the court has no right to question, and cannot serve as grounds for finding the existence of any conflicts of interest.

Likewise, the trial and appellate courts also feared that "spillover" caused by multiple representation might cause a jury to improperly infer negative facts as to certain Petitioners. However, "spillover" might similarly cause a jury to infer positive facts as to "certain Petitioners. Nonetheless, such "spillover" does not raise conflict of interest issues; rather, should it occur, it is the result of trial strategy, based upon the defendants' initial decision to present a common defense and to be represented by a single attorney.

Another major concern expressed by the lower courts was their fear that Petitioners Keweshan, NcNamee, and Landis might be prejudiced by virtue of their association with Flanagan and by counsel's possible inability to distance them from Flanagan. PA6-PA7; PA14-PA16. However, to the contrary, it may well be that Keweshan, McNamee, and Landis would benefit from being identified with Flanagan. In either respect, no conflict of interest is inherent in such an association and it is the defendants, after consultation with their counsel and as a matter of trial strategy, who have the unalterable right to make just such a decision. Furthermore, such a risk, if any exists, is attendant to any case in which there is a common defense made for co-defendants, and is wholly irrelevant to multiple representation or conflict of interest issues.

Indeed, it is clear that the decisions of the trial and appellate courts were based, in part, on their unstated and mistaken assumptions that the defenses of Petitioners are antagonistic and that Petitioners have information which is incriminatory as to the others and, in part, on the belief of these courts that they had the authority to inject themselves into each Petitioner's right to determine the trial strategy and the defense which each would present to the charges. Beyond any doubt, this usurption by the Third Circuit and the District Court of the rights of Petitioners to present a common defense to the charges which have been brought and to counsel of

their choice cannot be tolerated and must be condemned.

## CONCLUSION

For all of the reasons set forth above, the Order of the Third Circuit Court of Appeals should be reversed and the matter remanded with instructions that the trial court proceed with pretrial matters. Petitioners' day in Court, assisted by counsel of their choice to present their joint defense, has been delayed long enough.

Respectfully submitted,
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